

BEFORE THE ARIZONA MEDICAL BOARD

In the Matter of

NILS E. FOLEY, M.D.

License No. 32906

For the Practice of Allopathic Medicine
In the State of Arizona.

Case No. MD-07-0076A

**CONSENT AGREEMENT FOR
LETTER OF REPRIMAND,
PROBATION AND MONITORED
AFTER-CARE PROGRAM**

CONSENT AGREEMENT

By mutual agreement and understanding, between the Arizona Medical Board ("Board") and Nils E. Foley, M.D. ("Respondent"), the parties agreed to the following disposition of this matter.

1. Respondent has read and understands this Consent Agreement and the stipulated Findings of Fact, Conclusions of Law and Order ("Consent Agreement"). Respondent acknowledges he has the right to consult with legal counsel regarding this matter.

2. By entering into this Consent Agreement, Respondent voluntarily relinquishes any rights to a hearing or judicial review in state or federal court on the matters alleged, or to challenge this Consent Agreement in its entirety as issued by the Board, and waives any other cause of action related thereto or arising from said Consent Agreement.

3. This Consent Agreement is not effective until approved by the Board and signed by its Executive Director.

4. The Board may adopt this Consent Agreement or any part thereof. This Consent Agreement, or any part thereof, may be considered in any future disciplinary action against Respondent.

1 5. This Consent Agreement does not constitute a dismissal or resolution of
2 other matters currently pending before the Board, if any, and does not constitute any
3 waiver, express or implied, of the Board's statutory authority or jurisdiction regarding any
4 other pending or future investigation, action or proceeding. The acceptance of this
5 Consent Agreement does not preclude any other agency, subdivision or officer of this
6 State from instituting other civil or criminal proceedings with respect to the conduct that is
7 the subject of this Consent Agreement.

8 6. All admissions made by Respondent are solely for final disposition of this
9 matter and any subsequent related administrative proceedings or civil litigation involving
10 the Board and Respondent. Therefore, said admissions by Respondent are not intended
11 or made for any other use, such as in the context of another state or federal government
12 regulatory agency proceeding, civil or criminal court proceeding, in the State of Arizona or
13 any other state or federal court.

14 7. Upon signing this agreement, and returning this document (or a copy thereof)
15 to the Board's Executive Director, Respondent may not revoke the acceptance of the
16 Consent Agreement. Respondent may not make any modifications to the document. Any
17 modifications to this original document are ineffective and void unless mutually approved
18 by the parties.

19 8. If the Board does not adopt this Consent Agreement, Respondent will not
20 assert as a defense that the Board's consideration of this Consent Agreement constitutes
21 bias, prejudice, prejudgment or other similar defense.

22 9. This Consent Agreement, once approved and signed, is a public record that
23 will be publicly disseminated as a formal action of the Board and will be reported to the
24 National Practitioner Data Bank and to the Arizona Medical Board's website.
25

1 10. If any part of the Consent Agreement is later declared void or otherwise
2 unenforceable, the remainder of the Consent Agreement in its entirety shall remain in force
3 and effect.

4 11. Any violation of this Consent Agreement constitutes unprofessional conduct
5 and may result in disciplinary action. A.R.S. § § 32-1401(27)(r) ("violating a formal order,
6 probation, consent agreement or stipulation issued or entered into by the board or its
7 executive director under this chapter") and 32-1451.

8 12. *Respondent has read and understands the conditions of probation.*

9
10
11 
NILS E. FOLEY, M.D.

DATED: 11/15/07

1
2 **FINDINGS OF FACT**

3 1. The Board is the duly constituted authority for the regulation and control of
4 the practice of allopathic medicine in the State of Arizona.

5 2. Respondent is the holder of license number 32906 for the practice of
6 allopathic medicine in the State of Arizona.

7 3. The Board initiated case number MD-07-0076A after Respondent notified the
8 Board that he used injectable Demerol on four occasions and that he overmedicated
9 patients in the operating room.

10 4. On February 8, 2007, Respondent, an anesthesiologist, contacted Board
11 staff and reported that he had overmedicated his patients while they were in the operating
12 room. However, he stated that no patients were harmed. A medical consultant randomly
13 reviewed the anesthesia records of three patients and determined that in each case the
14 anesthetic course was uneventful, vital signs were stable throughout the procedure, and
15 each of the patients were transported to the post anesthesia care unit in stable condition.

16 5. Additionally, Respondent reported to Board staff that his personal usage of
17 narcotics while in the operating room escalated. However, following a discussion with the
18 Board's contracted addictionologist ("Addictionologist") Respondent denied using any
19 narcotics, but rather admitted to only administering the narcotics to overmedicate the
20 patients. Later that day, Respondent contacted the Addictionologist and admitted he was
21 not truthful during their earlier conversation and stated he self injected Demerol on four
22 separate occasions between December 2006 and January 2006.

23 6. Prior to this complaint, on June 8, 2006, Respondent entered into a
24 Stipulated Health Agreement ("SHA") for Drug and/or Alcohol abuse/monitoring.
25 Respondent agreed that any violation of the SHA would constitute a violation of the Board

1 Order. Respondent's admission on February 8, 2007 to injecting Demerol on four separate
2 occasions violated the SHA.

3 7. The standard of care requires a physician to perform general anesthesia in
4 an unintoxicated manner.

5 8. Respondent deviated from the standard of care because he performed
6 general anesthesia while intoxicated.

7 9. When a physician practices under the influence of Demerol, patient
8 complications may occur, including respiratory arrest; cardiac arrest; brain damage and
9 death due to the physician's impaired judgment, cognition or technical skills.

10 **CONCLUSIONS OF LAW**

11 1. The Board possesses jurisdiction over the subject matter hereof and over
12 Respondent.

13 2. The conduct and circumstances described above constitute unprofessional
14 conduct pursuant to A.R.S. § 32-1401(27)(f) ("[h]abitual intemperance in the use of alcohol
15 or habitual substance abuse."), A.R.S. § 32-1401(27)(q) ("[a]ny conduct or practice that is
16 or might be harmful or dangerous to the health of the patient or the public.") and A.R.S. §
17 32-1401(27)(r) ("[v]iolating a formal order, probation, consent agreement or stipulation
18 issued or entered into by the board or its executive director under the provisions of this
19 chapter.").

20 **ORDER**

21 IT IS HEREBY ORDERED THAT:

22 1. Respondent is issued a Letter of Reprimand for performing general
23 anesthesia while under the influence of Demerol, for habitual intemperance and for
24 violating a Board Order.
25

1 2. **Respondent shall not practice anesthesia for two years.** The Board may
2 require any combination of Staff approved physical examination, psychiatric and/or
3 psychological evaluations, or successful passage of the Special Purpose Licensing
4 Examination or other competency examination/evaluation or interview it finds necessary to
5 assist it in determining Respondent's ability to safely and competently return to practicing
6 anesthesia.

7 3. Respondent is placed on Probation for **five years** with the following terms
8 and conditions:

9 a. Respondent shall submit quarterly declarations under penalty of
10 perjury on forms provided by the Board, stating whether there has been compliance with
11 all conditions of probation. The declarations shall be submitted on or before the 15th of
12 March, June, September and December of each year, beginning on or before March,
13 2008.

14 b.1. **Participation.** Respondent shall promptly enroll in and participate in the
15 Board's program for the treatment and rehabilitation of physicians who are impaired by
16 alcohol or drug abuse ("MAP"). Respondent's participation in MAP may be unilaterally
17 terminated with or without cause at the Board's discretion at any time after the issuance of
18 this Order.

19 2. **Relapse Prevention Group.** Respondent shall attend MAP's relapse
20 prevention group therapy sessions one time per week for the duration of this Order, unless
21 excused by the MAP relapse prevention group facilitator for good cause such as illness or
22 vacation. Respondent shall instruct the MAP relapse prevention group facilitators to
23 release to Board Staff, upon request, all records relating to Respondent's treatment, and
24 to submit monthly reports to Board Staff regarding attendance and progress. The reports
25 shall be submitted on or before the 10th day of each month.

1 3. **12 Step or Self-Help Group Meetings.** Respondent shall attend
2 ninety 12-step meetings or other self-help group meetings appropriate for substance
3 abuse and approved by Board Staff, for a period of ninety days beginning not later than
4 either (a) the first day following Respondent's discharge from chemical dependency
5 treatment or (b) the date of this Order.

6 4. Following completion of the ninety meetings in ninety days,
7 Respondent shall participate in a 12-step recovery program or other self-help program
8 appropriate for substance abuse as recommended by the MAP Director and approved by
9 Board Staff. Respondent shall attend a minimum of three 12-step or other self-help
10 program meetings per week for a total of twelve per month. Two of the twelve meetings
11 must be Caduceus meetings. Respondent must maintain a log of all self-help meetings.
12 Board Staff will provide the log to Respondent.

13 5. **Board-Staff Approved Primary Care Physician.** Respondent shall
14 promptly obtain a primary care physician and shall submit the name of the physician to
15 Board Staff in writing for approval. The Board-approved primary care physician ("PCP")
16 shall be in charge of providing and coordinating Respondent's medical care and treatment.
17 Except in an *Emergency*, Respondent shall obtain medical care and treatment only from
18 the PCP and from health care providers to whom the PCP refers Respondent.
19 Respondent shall request that the PCP document all referrals in the medical record.
20 Respondent shall promptly inform the PCP of Respondent's rehabilitation efforts and
21 provide a copy of this Order the PCP. Respondent shall also inform all other health care
22 providers who provide medical care or treatment that Respondent is participating in MAP.

23 a. "*Emergency*" means a serious accident or sudden illness that, if
24 not treated immediately, may result in a long-term medical problem or
25 loss of life.

1 6. **Medication.** Except in an *Emergency*, Respondent shall take no
2 *Medication* unless the PCP or other health care provider to whom the PCP refers
3 Respondent prescribes the *Medication*. Respondent shall not self-prescribe any
4 *Medication*.

5 a. “*Medication*” means a prescription-only drug, controlled
6 substance, and over-the counter preparation, other than plain aspirin,
7 plain ibuprofen, and plain acetaminophen.

8 7. If a controlled substance is prescribed, dispensed, or is administered
9 to Respondent by any person other than PCP, Respondent shall notify the PCP in writing
10 within 48 hours and notify the MAP Director immediately. The notification shall contain all
11 information required for the medication log entry specified in paragraph 8. Respondent
12 shall request that the notification be made a part of the medical record. This paragraph
13 does not authorize Respondent to take any *Medication* other than in accordance with
14 paragraph 6.

15 8. **Medication Log.** Respondent shall maintain a current legible log of
16 all *Medication* taken by or administered to Respondent, and shall make the log available to
17 the Board Staff upon request. For *Medication* (other than controlled substances) taken on
18 an on-going basis, Respondent may comply with this paragraph by logging the first and
19 last administration of the *Medication* and all changes in dosage or frequency. The log, at
20 a minimum, shall include the following:

- 21 a. Name and dosage of *Medication* taken or administered;
22 b. Date taken or administered;
23 c. Name of prescribing or administering physician;
24 d. Reason *Medication* was prescribed or administered.

25 This paragraph does not authorize Respondent to take any *Medication* other

1 than in accordance with paragraph 6.

2 9. **No Alcohol or Poppy Seeds.** Respondent shall not consume alcohol
3 or any food or other substance containing poppy seeds or alcohol.

4 10. **Biological Fluid Collection.** During all times that Respondent is
5 physically present in the State of Arizona and such other times as Board Staff may direct,
6 Respondent shall promptly comply with requests from Board Staff or MAP Director to
7 submit to witnessed biological fluid collection. If Respondent is directed to contact an
8 automated telephone message system to determine when to provide a specimen,
9 Respondent shall do so within the hours specified by Board Staff. For the purposes of this
10 paragraph, in the case of an in-person request, "promptly comply" means "immediately."
11 In the case of a telephonic request, "promptly comply" means that, except for good cause
12 shown, Respondent shall appear and submit to specimen collection not later than two
13 hours after telephonic notice to appear is given. The Board in its sole discretion shall
14 determine good cause.

15 11. Respondent shall provide Board Staff in writing with one telephone
16 number that shall be used to contact Respondent on a 24 hour per day/seven day per
17 week basis to submit to biological fluid collection. For the purposes of this section,
18 telephonic notice shall be deemed given at the time a message to appear is left at the
19 contact telephone number provided by Respondent. Respondent authorizes any person
20 or organization conducting tests on the collected samples to provide testing results to the
21 Board and the MAP Director.

22 12. Respondent shall cooperate with collection site personnel regarding
23 biological fluid collection. Repeated complaints from collection site personnel regarding
24 Respondent's lack of cooperation regarding collection may be grounds for termination
25 from MAP.

1 13. **Out of State Travel and/or Unavailability at Home or Office**

2 **Telephone Number.** Respondent shall provide Board Staff at least three business
3 days advance written notice of any plans to be away from office or home when such
4 absence would prohibit Respondent from responding to an order to provide a biological
5 fluid specimen or from responding to communications from the Board. The notice shall
6 state the reason for the intended absence from home or office, and shall provide a
7 telephone number that may be used to contact Respondent.

8 14. **Payment for Services.** Respondent shall pay for all costs,
9 including personnel and contractor costs, associated with participating in MAP at
10 time service is rendered, or within 30 days of each invoice sent to Respondent.

11 15. **Examination.** Respondent shall submit to mental, physical, and
12 medical competency examinations at such times and under such conditions as directed by
13 the Board to assist the Board in monitoring Respondent's ability to safely perform as a
14 physician and Respondent's compliance with the terms of this Order.

15 16. **Treatment.** Respondent shall submit to all medical, substance
16 abuse, and mental health care and treatment ordered by the Board.

17 17. **Obey All Laws.** Respondent shall obey all federal, state and local
18 laws, and all rules governing the practice of medicine in the State of Arizona.

19 18. **Interviews.** Respondent shall appear in person before the Board and
20 its Staff and MAP committees for interviews upon request, upon reasonable notice.

21 19. **Address and Phone Changes, Notice.** Respondent shall
22 immediately notify the Board in writing of any change in office or home addresses and
23 telephone numbers.

24 20. **Relapse, Violation.** In the event of chemical dependency relapse by
25 Respondent or Respondent's use of drugs or alcohol in violation of the Order,

Respondent's license shall be **REVOKED**. Respondent agrees to waive formal hearing on the revocation. In the alternative, Respondent may **SURRENDER HIS LICENSE** if he agrees in writing to being impaired by alcohol or drug abuse. A.R.S. § 32-1452(G).

21. **Notice Requirements.**

(A) Respondent shall immediately provide a copy of this Order to all employers and all hospitals and free standing surgery centers where Respondent currently has privileges. Within 30 days of the date of this Order, Respondent shall provide the Board with a signed statement of compliance with this notification requirement. Upon any change in employer or upon the granting of privileges at additional hospitals and free standing surgery centers, Respondent shall provide the employer, hospital or free standing surgery center with a copy of this Order. Within 30 days of a change in employer or upon the granting of privileges at additional hospitals and free standing surgery centers, Respondent shall provide the Board with a signed statement of compliance with this notification requirement.

(B) Respondent is further required to notify, in writing, all employers, hospitals and free standing surgery centers where Respondent currently has or in the future gains employment or privileges, of a chemical dependency relapse, use of drugs or alcohol in violation of this Order and/or entry into a treatment program. Within seven days of any of these events Respondent shall provide the Board written confirmation of compliance with this notification requirement.

22. **Public Record.** This Order is a public record.

23. **Out-of-State.** In the event Respondent resides or practices as a physician in a state other than Arizona, Respondent shall participate in the rehabilitation program sponsored by that state's medical licensing authority or medical society. Respondent shall cause the monitoring state's program to provide written reports to the

1 Board regarding Respondent's attendance, participation, and monitoring. The reports
2 shall be due quarterly on or before the 15th day of March, June, September, and
3 December of each year, until the Board terminates this requirement in writing. The
4 monitoring state's program and Respondent shall immediately notify the Board if
5 Respondent: a) is non-compliant with any aspect of the monitoring requirements; b)
6 relapses; c) tests positive for controlled substances; d) has low specific gravity urine drug
7 test(s), missed and/or late urine drug tests, or otherwise rejected urine drug tests; and e) is
8 required to undergo any additional treatment.

9 24. This Order supersedes all previous consent agreements and
10 stipulations between the Board and/or the Executive Director and Respondent.

11 25. The Board retains jurisdiction and may initiate new action based upon
12 any violation of this Order.

13 26. Respondent shall immediately obtain psychotherapy treatment. The
14 treating psychotherapist must be approved by Board Staff. Respondent shall comply with
15 the psychotherapist's recommendations for continuing care and treatment. Respondent
16 shall instruct the psychotherapist to submit quarterly written reports to the Board regarding
17 diagnosis, prognosis, and recommendations for continuing care and treatment. The
18 reports must be submitted on or before the 15th day of March, June, September and
19 December of each year. Respondent shall provide the psychotherapist with a copy of this
20 Order. Respondent shall pay the expenses of all the psychotherapy and is responsible for
21 paying for the preparation of the quarterly reports.

3. This Order is the final disposition of case number MD-07-0076A.

DATED AND EFFECTIVE this 14th day of December, 2007.

ARIZONA MEDICAL BOARD

(SEAL)



By Amanda Diehl
AMANDA DIEHL, M.P.A., C.P.M.
Deputy Executive Director

ORIGINAL of the order provided
this 14th day of December, 2007 with:

Arizona Medical Board
9545 E. Doubletree Ranch Road
Scottsdale, AZ 85258

EXECUTED COPY of the foregoing mailed
this 14th day of December, 2007 to:

Nils E. Foley, M.D.
Address of Record

Chris Lundy
Investigational Review